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15  
16 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
17 IN AND FOR THE COUNTY OF YAVAPAI

18 STATE OF ARIZONA

19 Plaintiff,

20 vs.

21 STEVEN CARROLL DEMOCKER,

22 Defendant.

23 No. P1300CR20081339

24 Division 6

25 **DEFENDANT'S MOTION IN**  
26 **LIMINE TO PRECLUDE THE**  
27 **TESTIMONY AND REPORT OF**  
28 **RICHARD ECHOLS AND ALL**  
**TESTIMONY RELEVANT TO**  
**F(12) AGGRAVATOR**

29 Pursuant to Rules 15, and 16 of the Arizona Rules of Criminal Procedure, due  
30 process, and the Arizona and U.S. Constitutions, Defendant Steven DeMocker hereby  
31 moves *in limine* for an Order precluding the testimony of Richard Echols and any  
32 testimony related to proving the f(12) aggravator, which has been removed by prior  
33 order of this Court. This Motion is supported by the Due Process and Eighth  
34 Amendment clauses of the United States Constitution and counterparts in the Arizona  
35 Constitution, Arizona Rules of Evidence, Arizona Rules of Criminal Procedure and the  
36 following Memorandum of Points and Authorities.

1                                    **MEMORANDUM OF POINTS AND AUTHORITIES**

2                                    **BACKGROUND**

3            Richard Echols has been identified by the State as an expert on financial matters.  
4    Mr. Echols testified before the second grand jury and in *Chronis* hearings before this  
5    Court where the rules of evidence were not strictly applied. He has also submitted a  
6    written report. This Court has now determined that the State lacks probable cause to  
7    allege that this offense was motivated by witness elimination pursuant to f(12) and has  
8    struck this aggravating circumstance from the State's Notice of Intent to Seek the Death  
9    Penalty. (See December 8, 2009 Minute Entry).

10           Mr. Echols' report and prior testimony indicates that he was "asked to assist in  
11    the evaluation of the financial records, their impact on the divorce proceedings, and the  
12    possible financial motivation that could have led to Carol Kennedy's death." His report  
13    and prior testimony addresses three issues: the "book of business," "2007 tax returns,"  
14    and "documents filed." Although the report states that records "will be referred to in  
15    our evaluation in specific detail," not a single document is identified in the report by  
16    date, Bates number, place of recovery, or otherwise. The State has recently provided  
17    counsel with a list of items Mr. Echols relied on in preparing his report. This list does  
18    not contain a single Bates number even though the State has now produced well over  
19    16,000 pages and has often produced multiple versions of identical documents.

20                                    **ARGUMENT**

21           Rule 702, Arizona Rules of Evidence, provides that an expert may testify about a  
22    matter of "scientific, technical or other specialized knowledge" that will assist the trier  
23    of fact to understand the evidence or to determine a fact in issue. Ariz. R. Evid. 702.  
24    "The Rules of Evidence, and Rule 702 itself, erect barriers to admission of all opinion  
25    evidence: the evidence must be relevant, the witness must be qualified, and the evidence  
26    must be the kind that will assist the jury." *Logerquist v. McVey*, 196 Ariz. 470, 489, ¶  
27    57, 1 P.3d 113, 132 (2000). Rule 702 permits a qualified witness to testify in the form  
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1 of an opinion if it would assist the trier of fact to understand the evidence or determine a  
2 fact in issue. Ariz. R. Ev. 702; *Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 505, 917  
3 P.2d 222, 234 (1996) (stating trial court has broad discretion when determining whether  
4 a witness is competent to testify as an expert).

5  
6 **I. Expert Testimony Must be of Scientific, Technical, or Other Specialized Knowledge.**

7 Expert testimony is inadmissible if it concerns factual issues that are within the  
8 knowledge and experience of ordinary lay people. Conversely, expert testimony is  
9 permitted only when the subject is beyond the common experience of most people and  
10 where the opinion of an expert will assist the trier of fact. If a matter for expert  
11 testimony is of such common knowledge that a person of ordinary education and  
12 background could reach as intelligent a conclusion as an expert, the testimony should be  
13 precluded. *State v. Williams*, 132 Ariz. 153, 160, 644 P.2d 889, 896 (1982). Expert  
14 opinions will be rejected where facts can be intelligently described to and understood by  
15 jurors so that they can form reasonable opinions for themselves. *Shell Oil Co. v.*  
16 *Gutierrez*, 119 Ariz. 426, 434, 581 P.2d 271, 279 (App. 1978). The test "is whether the  
17 subject of inquiry is one of such common knowledge that people of ordinary education  
18 could reach a conclusion as intelligently as the witness ...." *State v. Chapple*, 135 Ariz.  
19 281, 292, 660 P.2d 1208, 1219 (1983) (citing *State v. Owens*, 112 Ariz. 223, 227, 540  
20 P.2d 695, 699 (1975)).

21  
22 **II. An Expert Must Be Qualified as an Expert About the Subject Matter of His Opinions.**

23 "[T]he trial court determines in each case 'whether the expertise of the witness is  
24 applicable to the subject about which he offers to testify.'" *Gemstar*, 185 Ariz. at 505,  
25 917 P.2d at 234 (quoting *Englehart v. Jeep Corp.*, 122 Ariz. 256, 258, 594 P.2d 510,  
26 512 (1979)). To qualify to testify as an expert witness, the witness must possess  
27 expertise that is applicable to the subject about which he intends to testify, and he must  
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1 have training or experience that qualifies him to render opinions which will be useful to  
2 the trier of fact. *Webb v. Omni Block, Inc.*, 216 Ariz. 349, 166 P.3d 140 (App. 2007).  
3 The party offering expert testimony must show that the witness is competent to give an  
4 expert opinion on the precise issue about which he is asked to testify. *Gaston v. Hunter*,  
5 121 Ariz. 33, 51, 588 P.2d 326, 344 (App. 1978). An expert will be excluded if he (1)  
6 has no relevant training or experience, (2) does not detail the basis for his opinions and  
7 conclusions, and (3) does not establish that his opinions and conclusions were based on  
8 data that was reasonably relied upon by experts in the field. *Holy Trinity Greek*  
9 *Orthodox Church v. Church Mut. Ins. Co.*, 476 F. Supp. 2d 1135 (D. Ariz. 2007)  
10 (witness did not qualify as expert, for purposes of giving an affidavit in opposition to  
11 summary judgment in bad faith case against property insurer regarding insurance claims  
12 handling practices).

13  
14 **III. Richard Echols' Testimony Is Not Proper Expert Testimony Under**  
15 **Rule 702 and Should be Excluded.**

16 Mr. Echols' potential testimony does not concern scientific, technical or other  
17 specialized knowledge that would assist a trier of fact and instead he has offered a range  
18 of opinions far outside the scope of his purported expertise.

19 Although the scope of work was described as above, Mr. Echols' report and  
20 testimony includes opinions and conclusions, not about the financial records, but rather  
21 about a range of issues he has no qualifications for nor foundation to support. The  
22 opinions in his report include legal conclusions about Mr. DeMocker's behavior that are  
23 contrary to Ms. Kennedy and her divorce lawyer's conclusions, about Mr. DeMocker's  
24 "understandings" of matters in the divorce proceedings, about Carol Kennedy's  
25 feelings, and about the nature and quality of the relationship between Mr. DeMocker  
26 and Ms. Kennedy. This testimony should be excluded as failing to qualify as proper  
27 expert testimony under Rule 702 and a common sense understanding of the role of  
28 experts in cases such as this.

1 Mr. Echols' conclusions about the following are clearly outside the scope of his  
2 expertise:

- 3 a. His opinion about the effect of the 2007 tax filing on the relationship  
4 between Ms. Kennedy and Mr. DeMocker in May 2008. This opinion  
5 also fails to acknowledge the obvious impact of the divorce settlement on  
6 the day of trial;
- 7 b. His conclusion that a confrontation between Mr. DeMocker and Ms.  
8 Kennedy was "set up" for July 2, 2008;
- 9 c. His "final analysis" opinions about the relationship between Mr.  
10 DeMocker and Ms. Kennedy, calling the relationship "very strained,"  
11 *commenting on emails between Ms. Kennedy and her daughter, opining*  
12 *about how Ms. Kennedy felt about her divorce attorney and other*  
13 *allegations throughout the divorce;*
- 14 d. Opining that correspondence between Mr. DeMocker and Ms. Kennedy,  
15 again without identifying any of it by date, Bates number or otherwise, is  
16 "significant and telling;" and
- 17 e. Legal conclusions that Mr. DeMocker committed perjury and the  
18 likelihood of Mr. DeMocker being "found guilty."

19 Further, Mr. Echols' conclusions about the following are not based on scientific,  
20 technical or other specialized knowledge:

21 Mr. Echols opines that "Mr. DeMocker clearly understands the value of his book  
22 of business" and then draws a legal conclusion that Mr. DeMocker "submitted  
23 fraudulent statements to the Court under penalty of perjury by not listing the value of  
24 his 'book of business.'" Mr. Echols does not identify by date or Bates number or any  
25 other reference this document that was allegedly submitted under "penalty of perjury."<sup>1</sup>  
26 Mr. Echols is not a legal expert.

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27 <sup>1</sup> Mr. Echols also fails to include substantial relevant information on this subject including: that it is a court's job  
28 to determine whether a book of business existed and, if it did, whether it was a marital asset subject to division or  
not; that an Arizona court had never considered the issue of a book of business or its value as a community asset;  
Mr. Fruge's explanation to the State that the court would in most cases not consider a false financial sheet in a  
divorce proceeding a violation of the court; and Mr. Casalena's report to Mr. Echols that Ms. Kennedy had  
concluded that the "book of business" argument would not be successful with the court and that part of the reason

1 Next, Mr. Echols opines that Mr. DeMocker had his 2007 return prepared using  
2 figures he knew to be false and that he was allegedly confronted about this by "Carol,  
3 Mr. Fruge, and Ms. Wallace on several occasions."<sup>2</sup> Mr. Echols does not identify how,  
4 which figures, or by what amount these figures were "false." Mr. Echols refers to no  
5 financial documents, although the State has subpoenaed and received thousands of  
6 pages of Mr. DeMocker's financial documents.

7 Finally, Mr. Echols' hyperbolic speculation is not based on any expertise. His  
8 speculation that certain events that did not occur would lead to "Mr. DeMocker losing  
9 his license to sell securities, and therefore everything he had would be lost, including his  
10 ability to produce the revenue he had been earning" is not based on scientific, technical  
11 or other specialized knowledge. This kind of rampant speculation concludes with the  
12 assertion that Mr. DeMocker "stands to lose all that he has." Finally, in another  
13 conclusion having nothing to do with Mr. Echols' asserted financial expertise, he  
14 declares that, "the resultant consequences are disastrous."

15 Mr. Echols' testimony to the second grand jury and to this Court is similar.  
16 Echols testified that that Mr. DeMocker was hiding assets in his divorce. (GJ 143:6-9).  
17 He also testified that "... the figures [Mr. DeMocker] was using were inaccurate, and in  
18 fact, some of the figures that he had submitted to the court were in fact fraudulent ... ."  
19 (GJ 147:8-11). Mr. Echols also testified that Mr. DeMocker was better off financially  
20 with the victim dead. (GJ 144:18-145:8). At the *Chronis* hearing Mr. Echols testified  
21 about Mr. DeMocker' "financial pressure" and changes in that supposed financial  
22 pressure leading up to Ms. Kennedy's death. (October 30, 2009 Chronis transcript,  
23 page 73:11-25).

24 Expert testimony on the question of whom to believe is nothing more than advice  
25 to the trier of fact on how to decide the case. Such testimony was not legitimized by

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26 for the divorce settlement was that she thought \$6,000 a month in alimony was more than she would receive from  
27 the court at a trial.

28 <sup>2</sup> No direct communication between Ms. Wallace and Mr. DeMocker has been disclosed to the defense.

1 Rule 704, and is not admissible under Rule 702. The same principle applies to expert  
2 opinion testimony on whether the crime occurred, whether the defendant is the  
3 perpetrator, and like questions. *See State v. Moran*, 151 Ariz. 378, 383, 728 P.2d 248,  
4 253 (1986); *see also State v. Montijo*, 160 Ariz. 576, 774 P.2d 1366 (App. 1989). An  
5 expert's belief in a witness's credibility "has never been a permissible subject of expert  
6 opinion less the trial process return to the discredited notion of marshalling adherents of  
7 either side as oath takers." *Moran*, 151 Ariz. at 383, 728 P.2d at 253, citing M. UDALL  
8 & J. LIVERMORE, LAW OF EVIDENCE § 22, at 30-31 (2d ed. 1982).

9 Mr. Echols' report and his court testimony were full of opinions he is not  
10 qualified to offer and conclusions that are not properly the subject of expert testimony.  
11 Both a jury and the court are able to draw conclusions based on the evidence, and Mr.  
12 Echols' rank speculation, hyperbole and unsupported legal conclusions are of no  
13 assistance to anyone. This Court acknowledged as much in striking certain opinions  
14 from Mr. Echols' report at a hearing on November 19, 2009. (See Minute Entry  
15 November 19, 2009). Mr. Echols' opinions will not be helpful to the trier of fact and  
16 should be excluded.

17  
18 **IV. Testimony Related to the f(12) Aggravator, Witness Elimination,  
Should be Excluded.**

19 Mr. Echols and all other witnesses should also be prohibited from offering any  
20 testimony regarding the (f)(12) aggravator as this Court has struck that aggravator. The  
21 three areas of Mr. Echols' report are only relevant to the f(12) aggravator: the "book of  
22 business," "2007 tax returns," and "documents filed." These areas are not relevant to  
23 the remaining aggravators and testimony relating to them by Mr. Echols, and any other  
24 witness, should be excluded. This would also include any such testimony by Mr.  
25 Casalena and Ms. Wallace.

26 At the second grand jury presentation Mr. Ainley asked Mr. Echols, "[w]hat  
27 happens if the IRS starts taking a look at this?" He responded by asserting that the IRS  
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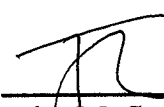
1 is "not going to be happy. I think that's an understatement, but they were not going to  
2 be happy" if they looked at Mr. DeMocker's financial practices. (GJ 146:21-25). Mr.  
3 Echols further speculated when asked by Mr. Ainley "what happens if there is hanky-  
4 panky with his finances?" He responded that if Mr. DeMocker was guilty of what Ms.  
5 Kennedy was supposedly alleging, "he would lose his license with [sic] or an ability to  
6 work for UBS or anyone else, and ... then he would lose everything, his book of value  
7 (sic), his ability to be in that business at all, and with assets only being a car, he would  
8 be in serious trouble." (GJ 147:4-148:2). This Court should prohibit any testimony  
9 about matters which are not relevant to the remaining aggravators. This includes any  
10 testimony about the divorce decree or tax returns about which Ms. Kennedy was  
11 allegedly dissatisfied, any testimony by or about Mr. Casalena's report, any testimony  
12 about Mr. DeMocker's allegedly fraudulent representation of his assets in the divorce  
13 (Chronis testimony of Mr. Echols, October 30, 2009 page 42:17-24), and any testimony  
14 that Ms. Kennedy was allegedly considering taking Mr. DeMocker back to court (*Id.*  
15 45:57), reporting Doug Rader to the accounting board, or reporting Mr. DeMocker to  
16 the IRS. This testimony is not relevant to the remaining aggravators and should be  
17 excluded.

### 18 CONCLUSION

19 For these reasons, Mr. DeMocker requests that this Court preclude the testimony  
20 of Mr. Echols and limit the testimony of others as requested herein.

21 DATED this 18<sup>th</sup> day of December, 2009.

22 By:

  
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**ORIGINAL** of the foregoing filed  
This 18<sup>th</sup> day of December, 2009, with:

Jeanne Hicks  
Clerk of the Court  
Yavapai County Superior Court  
120 S. Cortez  
Prescott, AZ 86303

**COPIES** of the foregoing hand delivered  
this 18<sup>th</sup> day of December, 2009, to:

The Hon. Thomas B. Lindberg  
Judge of the Superior Court  
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120 S. Cortez  
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